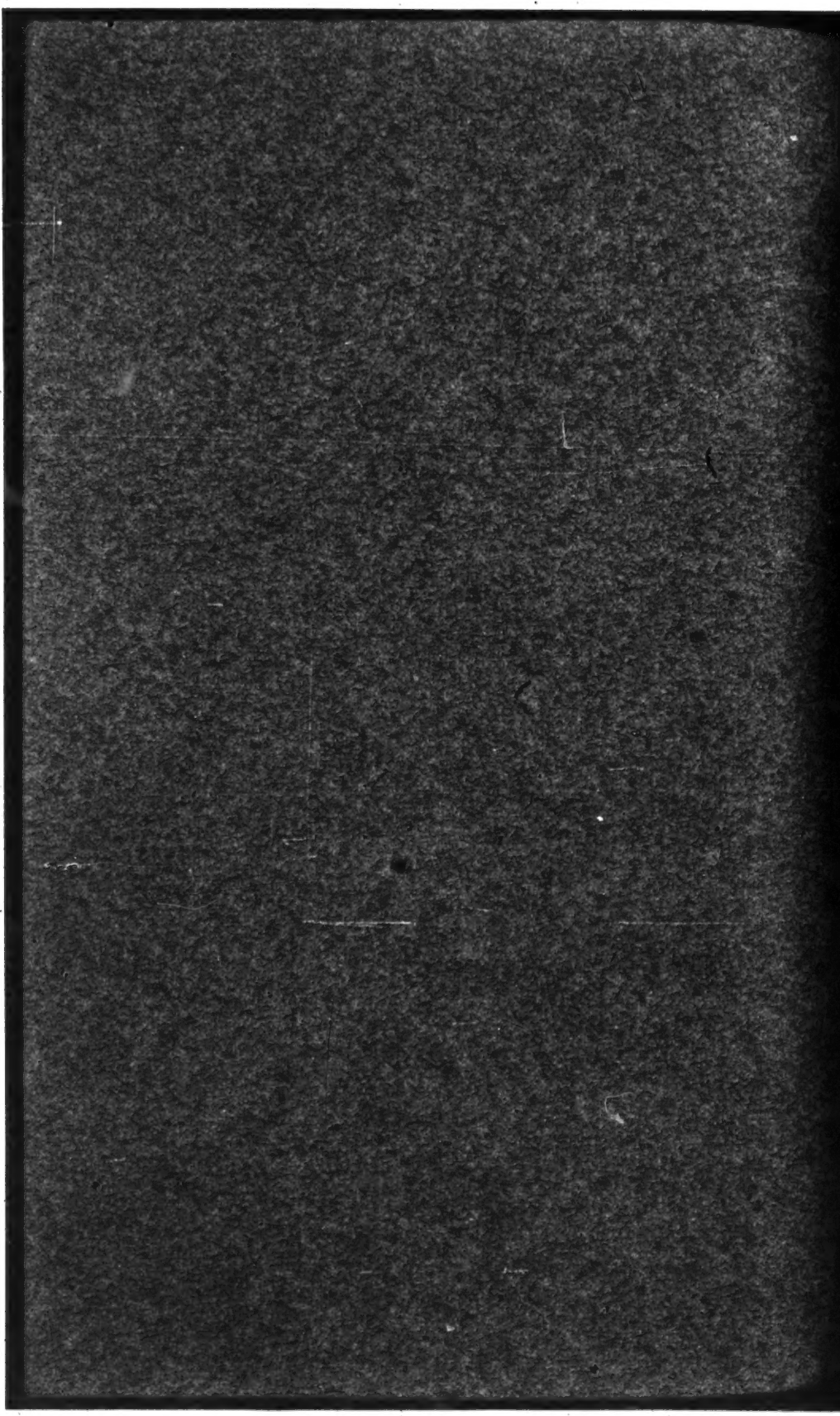


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No. 10, Original

In the Supreme Court of the United States

OCTOBER TERM, 1960

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, DEFENDANTS

REPLY BRIEF BY RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, ON MOTION TO DISMISS THE BILL OF COMPLAINT

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 19, ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF Utah, State of New Mexico, State of Colorado, State of Wyoming, and Ray Lyman Wilbur, Secretary of the Interior, defendants

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REPLY BRIEF

In our original brief in support of the Defendant Wilbur's motion to dismiss the bill of complaint we contended that there are no allegations in the complaint that any existing or vested right has been invaded or is presently threatened (Point II, pp. 18–24) and that accordingly the bill of complaint presents only abstract questions which may never arise in any justiciable case or controversy. (Point III, pp. 24–26.)

In its brief Arizona concedes that at the present time the intervention of a court of equity is not necessary to protect the exercise and enjoyment of

rights of appropriators acquired prior to the effective date of the Act and Compact and that there is no allegation that these rights are threatened. (Arizona brief, p. 17.) Attempt is then made to support the bill as follows:

> 2. The bill alleges the threat of immediately impending injury to Arizona and its people from acts of defendant Wilbur and presents a case to which the judicial power extends. (Arizona brief, p. 26.)
>
> (a) Defendant Wilbur threatens to invade the quasi-sovereign rights of Arizona by building a dam within its jurisdicton and diverting and using water from its jurisdiction in violation of its laws. (Arizona brief, p. 27.)
>
> (b) Defendant Wilbur also threatens to prevent any use in Arizona of unappropriated Colorado River water now flowing there, and, at the same time, to deliver such water for use in other States under contracts, adverse to Arizona, for permanent service. (Arizona brief, p. 31.)

The statement (a) is insufficient to support the bill unless some interference with personal or property rights is also alleged. We have shown in our main brief that no such interference is adequately alleged. The statement (b) is not supported by allegation except by reference to the Boulder Canyon Project Act, the Regulations and the Water Contract which have reference only to "stored water" and such diversions are not shown to be in derogation of the personal or property rights of others.

Throughout its brief Arizona, while insisting that it is not bound by the Compact, complains that the defendants are imposing the terms of the Compact upon it. All of the defendants have in their briefs disclaimed any such right. What the defendant States have done is to limit their appropriations as the Compact provides and Congress has declared that withdrawals from the reservoir shall not be in violation of this agreement. Arizona having chosen to be free of the Compact may continue to make appropriations from the Colorado where rightful access may be had to the stream. The allegations that her citizens are being prevented from making such appropriations have been discussed in our main brief and we submit are insufficient.

We do not dispute the quasi sovereign right of a State to the protection of a court of equity against injury actual or threatened to property or persons within its borders; but it is entirely clear from the decisions of this Court that in the absence of any such injury there is no jurisdiction in equity to grant relief. In all such cases there must be actual or threatened injury to some proprietary right of the State or to some personal or property rights of its inhabitants. The cases cited by Arizona clearly illustrate this prerequisite of equitable jurisdiction even when the suit is brought by a State in its quasi sovereign capacity.

Thus in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, the suit was brought to enjoin defendant

from discharging from its works in Tennessee noxious gases which were causing wholesale destruction of forests, orchards, and crops and other injuries done and threatened in five counties in Georgia. In *Kansas* v. *Colorado*, 185 U. S. 125, the gravamen of the bill was that Colorado was depriving and threatening to deprive Kansas and its inhabitants of all the water in the Arkansas Valley to the injury of the State as an individual riparian owner and of all the inhabitants of the State and particularly those in the Arkansas Valley. The bill was sustained on demurrer because these allegations disclosed threats of serious injury to property rights. On final hearing the bill was dismissed not withstanding perceptible property damage. (*S. C.*, 206 U. S. 46, 117.) The complaint at bar fails to allege any such damage done or threatened. It proceeds upon the untenable theory that there has been an invasion of sovereignty without injury to property or person.

In *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, a private riparian owner unsuccessfully challenged the validity of a State statute which forbade the transportation of fresh water from lakes, ponds, and streams within the State through pipes into any other State for use therein. The decision furnishes no support for the plaintiff's bill of complaint.

In *Missouri* v. *Holland*, 252 U. S. 416, suit was brought in the District Court to enjoin a United

States game warden from enforcing the Migratory Bird Treaty Act and regulations thereunder. The State alleged a pecuniary interest as owner of wild birds within its borders and this allegation was admitted by the Government to be sufficient basis for equitable relief if the statute was unconstitutional. The validity of the statute was upheld both in the District Court and in this Court where it was said that there was proper assertion of the alleged quasi sovereign rights of the State. This was obvious because the game warden in enforcing the law was threatening to prevent the exercise of personal rights of the inhabitants of the State in lawfully killing game.

In *Trenton* v. *New Jersey*, 262 U. S. 182, the State sued the city in its own courts to recover a charge imposed by statute upon the diversion of waters from the Delaware River. The city claimed a property right which could not be impaired by statute. It was held that the defense could not be sustained because the city was an instrumentality of the State. Obviously this case furnishes no support for plaintiff's bill.

In *New York* v. *New Jersey*, 256 U. S. 296, an original suit to enjoin New Jersey from discharging sewage in the Upper Bay of New York Harbor, it was expressly alleged that pollution would amount to a public nuisance, which would result in grave injury to the health, property and commer-

cial welfare of the people of the State and City of New York. This court said (pp. 301, 302):

> The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States. *Missouri* v. *Illinois*, 180 U. S., 208, 241, 243; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.

But the bill was dismissed without prejudice because the complainants had not shown by convincing evidence that a public nuisance would result from the acts of the defendant.

In *Colorado* v. *Toll*, 268 U. S. 228, suit was brought in the District Court by Colorado against the Superintendent of Rocky Mountain National Park to enjoin him from carrying out certain park regulations, particularly with regard to automobile traffic, which were alleged to be unauthorized by Congress. The bill was dismissed on the merits in the District Court. In this Court it was sustained as properly brought. Upon the allegations of the bill it appeared that the defendant was without right interfering or threatening to interfere with the use of the highways by persons who were entitled to use them all in derogation of the sovereignty of the State.

In *Wyoming* v. *Colorado*, 259 U. S. 419, it was alleged that Colorado was diverting water from

the Laramie River to another watershed to the injury of prior appropriators in Wyoming. In meeting the contention that prior appropriators of water from the stream in Wyoming must be served, Colorado broadly contended, as Arizona does in this suit, that she had an absolute right to control all the waters in her territory because her rights were sovereign and superior to the rights of appropriators in either State. The Court declined to recognize any such right in Colorado and measured the rights of the two States in accordance with the appropriations made by their citizens, concluding that the doctrine of appropriation "furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this." This is a controlling decision in its application to the case at bar and yet Arizona complains of no diversion actual or threatened which will invade any right predicated upon appropriation which has been or is planned or proposed to be made. *Kansas* v. *Colorado, supra,* and *Wyoming* v. *Colorado, supra,* clearly show that where there has been no damage to water rights perfected by appropriation there can be no relief.

In *Marshall Dental Co.* v. *Iowa,* 226 U. S. 460, this Court affirmed a decree of the Supreme Court of the State of Iowa enjoining an intruder without title to the bed of a fresh water lake from draining the lake. The right of the State to maintain the suit, whether it owned the bed of the lake or not,

was sustained. Property damage done or threatened was obviously involved in this suit.

The authorities cited by Arizona show the necessity of allegation and proof of injury actual or threatened to sustain its bill. That the mere diversion of water without its permission in the absence of allegation that any person will be deprived of its use is no cause of suit is entirely clear. *New York* v. *Illinois*, 274 U. S. 488; *New Jersey* v. *Sargent*, 269 U. S. 328; *Connecticut* v. *Massachusetts* (No. 12 Original Oct. Term 1930, decided February 24, 1931). See also *Georgia* v. *Stanton*, 6 Wall. 50; *Florida* v. *Mellon*, 273 U. S. 12; *Massachusetts* v. *Mellon*, 262 U. S. 447.

What was said in *New Jersey* v. *Sargent*, *supra* (p. 337) of vague allegations of projects for future use of water and what was said in *Georgia* v. *Stanton* (pp 76–77) of a prayer for relief merely declaratory of the unconstitutionality of a Federal statute are pertinent comments upon the insufficiency of the bill in this case. The determination of this Court in *Connecticut* v. *Massachusetts*, *supra*, that no injury to the King's Island power development was shown demonstrates the lack of allegation of any injury essential to the maintenance of this suit in Arizona's bill of complaint.

Our position, we submit, is strengthened by Arizona's concession of lack of injury to persons or property. The complainant's brief shows the case to be a naked assertion that the defendant Wil-

bur is proposing to divert water from the Colorado, which no person even proposes to use for any beneficial purpose. The bill, we submit, should be dismissed.

Respectfully submitted.

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MARCH, 1931.

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